IMPROVEMENT IN CRIMINAL PLEADING.

FROM time to time there are sharp expressions of impatience with the results of important criminal trials in this Commonwealth.[1] Such expressions are not so frequent as they well might be. And if all of the proceedings in criminal causes, unimportant as well as important, were well understood, there is little doubt that dissatisfaction would be felt to so great an extent as to create a loud call for a revision of our methods. The need of an overhauling becomes apparent to one who examines our present system of criminal pleading and procedure. There are faults which result in positive public harm. That these can be corrected has been and is the opinion of those charged with the administration of the law, and of students of the system. State officials have made suggestions of changes, but have limited their recommendations. The Supreme Judicial Court has recognized that improvement might be made. It is certain that reform must come. There is no sufficient reason why it should not be begun at once.

The first step in criminal procedure for us to consider is the formal accusation, which ordinarily is by way of complaint or indictment. Informations are so infrequent that there is no occasion to consider them in this article. No change is needed in the method of entering a complaint. The rules with respect to setting out offences are the same in complaints as in indictments. They will be considered hereinafter when the subject of indictment is reached.

So far as the grand jury — the body which presents the indictment — is concerned, there is no trouble of consequence. It does its duty speedily and well. Although it is influenced to a considerable extent by the advice of the prosecuting officer, there are many occasions when it acts independently and to excellent advantage. In prosecutions for most offences its acts are satisfactory. In some

[1] This feeling is not confined to this State. There are occasional outbursts of protest against the way in which the criminal law is administered elsewhere. No one could hear the paper recently read before the Unitarian Club in Boston by Ex-President A. D. White without being strengthened in the conviction that a remedy must be sought and applied. The same general defects exist in many of the States. Some have special difficulties growing out of local statutes and decisions. With honest effort on the part of the Legislatures, most of such difficulties can be remedied.

offences they are especially so. In cases arising from alleged violation of election laws, and from words and writings in the course of political campaigns, the grand jury stands as a safeguard from excess of zeal or lack of proper attention on the part of prosecuting officers. It relieves them from pressure which, brought to bear in the heat of party excitement, is hard to withstand. It is an independent body, responsible to no one, yet bound by rules of law furnished by the courts; so that if there should be any inclination to act illegally, which very rarely happens, such inclination is held in check. As it is not practicable or safe to bring influence to bear on the members of this body, the attempt is seldom made. The members are selected from the different towns and cities in the county. They have peculiar knowledge of local needs, and as occasion requires they present public corporate bodies, as well as others, for failure to perform their duties, — such as neglect to repair ways, provide schoolhouses, and the like. They visit public institutions, and give valuable suggestions at times when no formal presentment is made. Good results are reached in this quiet and effective way.

It is an ancient institution, which has proved its value by centuries of satisfactory work. It should not be set aside without good reason. Danger may well be apprehended if the power to institute public prosecutions be given to one person.

The first trouble of consequence occurs in drawing the indictment. This should be plain and simple in its terms; but frequently it is not.

The timidity of the pleader, the requirements of pleading at common law, and Article XII. of the Declaration of Rights in the Constitution of Massachusetts, are the chief obstacles, actual and seeming, in the way of improvement.

The pleader is fearful lest, in departing from time-honored forms, he may put the prosecution in peril of failure. He is loth to construct new forms, and therefore adheres to the antiquated precedent. As in ancient days the test was whether the case could be brought to fit the writ, so now the inquiry many times is whether the case fits the form of indictment. The pleading is highly technical. It is confused by the variety of forms adopted and rigidly adhered to. These are far from uniform. We have a collection of precedents adjudged sufficient in form, some of which are plain to any one, and others involved and wellnigh unintelligible, except to those specially trained in the subject. The latter forms are our

concern. Many of them have come down from a time when the indictment was in the Latin tongue. They are translations which preserve literally the form and construction of the old Latin indictment. The language is quaint, and requires close attention for an understanding of the real nature of the charge. Again, one pleader was more prolix than another. But the form, prolix or terse, being declared good, was followed, and is followed to-day. So there came lack of uniformity. If skilled pleaders had originated all of the precedents, it is safe to say that a more uniform system would have resulted.

Many if not most of the forms may be made more simple if the pleader will make the effort. But it is not probable that any concerted action will be taken by those who frame the indictments. There are occasional instances where the forms are abbreviated. They are rare, however. Further brevity should be practised. Still the change will necessarily be so extensive that no substantial improvement can be expected without legislative action.

According to Lord Hale, an indictment is a plain, brief, and certain narrative of an offence committed by any person, and of those necessary circumstances that concur to ascertain the fact and its nature. The general principles of pleading with respect to declarations at common law and to indictments were the same. The chief rule was that the indictment should be plain and certain. This was required in order that the accused should know what he was to answer, that he might not be tried again, that there might be a proper judgment, and that posterity might know what law was to be derived from the record. The difficulty has been in the application of the rule, simple in itself, but confused in time by the variety of forms adopted by those framing the indictments and ultimately sanctioned by the courts. It was easy to understand and apply the rule so far as it related to time, place, value, and the name of the injured person; but the confusion arose when the rule was applied to the description of property and of the offence. The pleader could state some kinds of property readily enough, but ordinarily he could not specify accurately as to money. He could not give an exact description of each bill and coin. And so several general descriptions were set forth in the hope that some one or more would be proved at the trial.[1] Under the rule of the law,

[1] In indictments for larceny the common allegation is: "—— promissory notes current as money in this Commonwealth, each of the denomination and value of ——

proof of one would suffice. Many of these recitals are in use to-day.

It is not worth while to enumerate further instances of expanded descriptions of property. The foregoing is sufficient to show that a change in the direction of brevity should be made. As for the description of the offence, the reader will call to mind the long precedents of indictments for manslaughter by negligence, perjury, obtaining property by false pretences, and other offences. Counts in indictments are multiplied. It is not necessary to use many pages of words in such cases.[1] No useful purpose is served thereby. Many unnecessary questions are invited at the trial which would not arise if the forms were shorter.

In most statutory offences the indictment is reasonably plain. The general rule is that it is sufficient to charge the offence in the words of the statute. But there are perplexing exceptions.[2]

Undoubtedly, the merciful inclination of the judges in favor of life accounts for a large part of the purely technical requirements in the old indictments. The technical rules served a justifiable and even necessary purpose in restraining the brutal severity of the criminal law a century ago. The criminal law of to-day is not brutal or unduly severe. Therefore the reason for the rules has ceased to exist. Many feel that, in the anxiety for the protection

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dollars," (the allegation repeated for the several denominations, — two, five, ten, etc.,) "a more particular description of which is to said (grand) jurors unknown, —— silver coins of the coinage of the United States, each coin of the amount and value of —— cents," and so on, repeating the allegation so as to include the various denominations. A statute containing a provision that it shall be sufficient to allege generally money to a certain amount, similar to the one relating to embezzlement (Pub. Sts. c. 203, § 44), would suffice to correct this practice.

[1] An approved precedent of an indictment for manslaughter by negligence occupies nearly five pages, large octavo. Train & Heard, Prec. Indict. 263. A precedent in Heard's Criminal Law, p. 521, contains seven counts, varying in length from a page and a half to two pages and a half. These forms were taken from Cox's Criminal Cases, and were framed before 1851. They are followed to-day in this State.

The Maverick Bank prosecutions in the United States courts (Mass.), 1892–93, furnish examples of multiplication of counts. Nine indictments, containing one hundred and eighty-one counts, were found in the District Court against Asa P. Potter. One count was nol-prossed and the remaining one hundred and eighty were quashed for insufficiency. Two indictments, containing one hundred and ten counts, were found against him in the Circuit Court. Fifty-eight of these were quashed. The defendant was convicted on fifteen and acquitted on twenty-five. Judgment was entered in his favor on twelve. The convictions were set aside for errors which occurred at the trial. It should be said that some of the counts set forth different offences.

[2] Com. *v.* Doherty, 103 Mass. 433; Com. *v.* Barrett, 108 Mass. 302; Com. *v.* Connelly, 163 Mass. 539.

of the rights of the accused, the rights and safety of the public have in a measure been lost sight of. The Legislature can give great assistance. Is there any good reason why the criminal pleadings should not be as plain and simple as the pleadings at law? Time and statutes have changed the pleadings in civil actions, so that to-day the pleaders state their claims in language readily understood by the layman. Should the indictment be more involved? The office of each is to inform the defendant of that which he is charged with having done or failed to do.

Such unnecessary technical requirements are the source of serious public harm.[1] This has been recognized from early times. Lord Hale observed, "That in favor of life great strictnesses have been in all times required in points of indictments, and the truth is that it is grown to be a blemish and inconvenience in the law and the administration thereof; more offenders escape by the over easy ear given to exceptions in indictments than by their own innocence, and many times gross murders, burglaries, robberies, and other heinous and crying offences escape by these unseemly niceties, to the reproach of the law, to the shame of the government, and to the encouragement of villany, and to the dishonor of God. And it were very fit that by some law this overgrown curiosity and nicety were reformed, which is now become the disease of the law, and will I fear in time grow mortal without some timely remedy."[2]

Other writers have recognized the need of thorough change, and repeatedly have expressed their opinions in unmistakable language. In England, nearly forty-five years ago, Parliament passed an act[3] which brought relief. The workings of the criminal courts under

[1] The recent case of Com. *v.* Wheeler, 162 Mass. 429, furnishes an example of the technical strictness of the law of criminal pleading to-day. The defendant was indicted for breaking and entering. The indictment began in the usual way: "Commonwealth of Massachusetts, Worcester ss." It then described the defendant as of Buckland, in Franklin County, and set forth that the offence was committed at "Westminster, in said county." The court held that the indictment should have been quashed by the Superior Court, because it did not allege with sufficient certainty that the offence was committed in Worcester County. The court said: "While the court knows that there is a town named Westminster in the county of Worcester, there is no allegation that the offence was committed at the town of Westminster, but simply at Westminster, which is not alleged to be a town or place within the county of Worcester."

[2] 2 Hale, P. C. 193.

[3] 14 & 15 Vict. c. 100. Administration of Criminal Justice Improvement Act, Aug. 7, 1851. There is a call for still further change in England. Since this article was placed in the hands of the printer, there has appeared in the Law Quarterly Review for April an article on indictments, by H. L. Stephen, advocating greater simplicity and brevity.

this and subsequent acts have been satisfactory. It is interesting to note the preamble to the act: —

"Whereas offenders frequently escape conviction on their trials by reason of the technical strictness of criminal proceedings in matters not material to the merits of the case; and whereas such technical strictness may safely be relaxed in many instances, so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence; and whereas a failure of justice often takes place on the trial of persons charged with felony or misdemeanor by reason of variances between the statement in the indictment on which the trial is had and proof of names, dates, matters, and circumstances therein mentioned, not material to the merits of the case, and by the misstatement whereof the person on trial cannot have been prejudiced in his defence; be it therefore enacted," etc.

Many of the evils removed by this statute in England exist with us to-day. Guilty persons are acquitted in consequence of the lack of proper and reasonable rules of law in this regard. The extent of this failure of justice is not easily ascertained. Our published reports show only the cases wherein the justices presiding at the trials have ruled in favor of the Commonwealth. They do not show the cases wherein the rulings have been favorable to the accused. Hence many cases in which the prosecution has been delayed or defeated on account of some technical defect or error not going to the merits of the case are not known to the public. That is to say, the reasons for the delay or failure are not known. The public finds fault somewhat blindly, but after all justly. For it is a public misfortune when a guilty person escapes punishment through a mere technicality.

Legislation alone can cure these evils. Some statutes in this direction have already been enacted. These have done good, but they are not comprehensive enough.

We have seen that the pleaders, through fear of possible failure, were led to perpetuate the redundancy of some of the ancient forms, — a redundancy nor required by the law, — and have noted the confusion which arose therefrom. We have also seen the harm resulting from the actual requirements of the common law. It now remains to consider the constitutional objections.

Article XII. of the Declaration of Rights has seemed to be an obstacle in the way of further reform. It is believed, however, that the obstacle is seeming rather than real, and also that a brief examination of this subject matter will show that the objection to

change assumes constitutional difficulties which do not exist; that these from frequent assertion have acquired thereby a certain degree of respect. Certainly useful changes have been prevented by this assumption of difficulty. The objection is that simplyfying the indictment to any considerable extent would be contrary to that article, and consequently unconstitutional. It therefore is necessary to see what the article is, and what it means. The portion which concerns us is that the crime shall be "fully and plainly, substantially and formally described." These few words have stood in the way of the enactment of statutes, and have been the *bête noire* of pleaders. Fortunately the courts have given their interpretation of the meaning of the words from time to time. More than sixty years ago it was said of the article: —

"Whilst it is important to the administration of public justice and the reasonable execution of the laws that indulgence should not be too readily yielded to mere technical niceties and subtleties, it is also important that every man accused of crime should have a reasonable opportunity to know what the charge is, that he may not be called to meet evidence at the trial that he could not have anticipated from the charge, that the court may know what judgment to render, and that the party tried and either acquitted or convicted may be enabled, by reference to the record, to shield himself from any further prosecution for the same offence."[1]

Again, it was said by the same justice: —

"The object of the Declaration of Rights was to secure substantial privileges and benefits to parties criminally charged; not to require particular forms, except where they are necessary to the purposes of justice and fair dealing towards the persons accused, so as to ensure a full and fair trial."[2]

In Com. *v.* Robertson,[3] where the Attorney General broke away from some of the technical allegations until then incorporated in indictments for murder, the indictment was held good, and within the constitutional limit. Knowlton, J., said: "The provisions of Article XII. of the Declaration of Rights, which secure to the accused person the right to have his crime or offence 'fully and plainly, substantially and formally described to him,' only require such particularity of allegation as may be of service to him in enabling him to understand the charge and to prepare his defence."

[1] Shaw, C. J., in Com. *v.* Phillips, 16 Pick. 211, 214 (1834).
[2] Com. *v.* Holley, 3 Gray, 458.
[3] 162 Mass. 90.

The indictment in this case was as follows:—

"That Daniel M. Robertson of New Bedford in the county of Bristol, at New Bedford in the county of Bristol, on the ninth day of September in the year of our Lord eighteen hundred and ninety-three, in and upon one Mary Robertson, feloniously, wilfully, and of his malice aforethought an assault did make, and with a certain weapon, to wit, a knife, which the said Daniel M. Robertson then and there held, her, the said Mary Robertson, feloniously, wilfully, and of his malice aforethought did strike, cut, stab, and thrust in and upon the head of her, the said Mary Robertson, giving to her, the said Mary Robertson, by the striking, cutting, stabbing, and thrusting in and upon the head of her, the said Mary Robertson, one mortal wound, of which said mortal wound the said Mary Robertson then and there died.

"And so the jurors aforesaid, upon their oath and affirmation aforesaid, do say that the said Daniel M. Robertson the said Mary Robertson, in manner and form aforesaid, then and there feloniously, wilfully, and of his malice aforethought did kill and murder, against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided."

Prior to Com. *v.* Robertson the form in use was substantially like the following:—

"That William Coy of Westfield aforesaid, on the thirtieth day of August in the year of our Lord one thousand eight hundred and ninety-one at Washington aforesaid in the county of Berkshire aforesaid, with force and arms in and upon one John Whalen feloniously, wilfully, and of his malice aforethought, did make an assault, and that he the said William Coy then and there with a certain axe which he the said William Coy in his hands then and there had and held, him the said John Whalen in and upon the head of him the said John Whalen, on the left side of the head of him the said John Whalen in front of the ear, and near to the left ear of his the said John Whalen's said head then and there feloniously, wilfully, and of his malice aforethought did strike, giving unto him the said John Whelan then and there at Washington aforesaid in the county of Berkshire aforesaid, with the axe aforesaid, by the stroke aforesaid, in the manner aforesaid, in and upon the head of him the said John Whalen on the left side of his said head and in front of and near the left ear of his the said John Whalen's said head, one mortal wound of the length of four inches, of the breadth of one inch, and of the depth of one half-inch, of which said mortal wound the said John Whalen then and there instantly died; and so the jurors aforesaid, upon their oath aforesaid, do say and present that the said William Coy him the said John Whalen in manner and form aforesaid then and there at Washington aforesaid, feloniously,

wilfully, and of his malice aforethought, did kill and murder against the peace of said Commonwealth, and contrary to the form of the statute in such case made and provided." [1]

In England the statutes provide that in indictments for murder it is not necessary to set forth the manner in which or the means by which the death of the deceased was caused, but it is sufficient to charge that the defendant did feloniously, wilfully, and of his malice aforethought kill and murder the deceased.

A statute like this, if passed by our Legislature, would probably be declared unconstitutional. The indictment with us must contain some description of the act. An indictment setting forth that the defendant at a time and place stated, feloniously, wilfully, and of his malice aforethought assaulted the deceased and feloniously, wilfully, and of his malice aforethought killed and murdered him by striking him on the head with an axe, would seem to preserve all the constitutional rights of the defendant, and ought to be sufficient if authorized by statute. A slight change would suffice to make the charge murder in the second degree. The latter charge cannot be made under our present practice.

Information of the charge is what must be given. If this is provided, the constitutional limit is not passed. But the essential matters must be stated; if any of these are omitted, the limit is transgressed. Where the statute provided that a person convicted of drunkenness should be punished by a fine of one dollar, and also that, if the person had been convicted of drunkenness twice within the twelve months next preceding such conviction, he should be punished more severely, and the same statute provided that it should not be necessary to allege in the complaint the previous convictions, it was held that the latter clause was in conflict with the Declaration of Rights, and therefore void.[2] The reason for this is obvious. When a statute imposes a higher penalty upon a third conviction, it makes the former convictions a part of the character of the crime intended to be punished. They are essential to the offence, and therefore must be stated.[3] It does not follow, however, that the recital must be long. Information of the charge is what must be given, and this is all. In imparting this, simple and direct statement surely ought to be used. This is conveyed by some words which in themselves are descriptive. Words of art like

[1] Com. *v.* Coy, 157 Mass. 200.

[2] Com. *v.* Harrington, 130 Mass. 35.

[3] Com. *v.* Walker, 163 Mass. 226.

"burn" in arson,[1] "assault," "break," "enter," furnish all the information which the defendant can require so far as the indictment is concerned. No description of the means employed to cause the burning, assault, etc., need be set out. Other words and expressions will occur to the reader. Why should the long recitals given in the precedents be necessary in charging embezzlement, or perjury, or homicide? Many of them are not essential. Instead of furnishing certain information, as construed by the courts, they lend uncertainty to the proceedings. In some few cases a curious result has been reached. The rule requiring certainty of statement has been perverted by excess of allegation so as to cause uncertainty at the trial. The courts have been unwilling that the meritorious case should fail by reason of some variance between an unnecessarily detailed statement in the indictment and the proof at the trial, and so have decided that the variance is not material. There are many instances where they have said that the variance between the allegation and the proof is immaterial if the proof shows the thing to be of the same general nature. In homicide, where the charge is causing death by throwing on the floor, proof of death caused by throwing upon a chair is sufficient.[2] But the decisions are not uniform in this regard. It is not within the plan of this article to undertake to reconcile them. Although in an indictment for the larceny of a horse, it is not necessary to allege the color of the horse, yet, if the color is stated, it must be proved. Other cases might be cited.[3] It is familiar that, with few exceptions, allegations of time and place need not be proved, if the offence is not barred by the statute of limitations, and was committed within the county where the indictment is found.

That the Legislature may deal with the matter of criminal pleading, provided the constitutional provision is not violated, is beyond question. And thus acts may be passed which will not operate to relieve the pleader from imparting the information which we have seen is required to be given to the person accused. The court has

[1] The following is the precedent for arson at common law. It has done long and faithful service. "That A. B.," of etc., on etc., at etc., "feloniously, wilfully, and maliciously did set fire to and burn the dwelling-house of one C. D., there situate." This is a model. One wonders why such simplicity of form is not the rule, instead of the exception.

[2] Com. *v.* McAfee, 108 Mass. 458. See also on this subject Com. *v.* Morgan, 149 Mass. 314, and Com. *v.* Noble, 165 Mass. 13.

[3] See Com. *v.* Wellington, 7 Allen, 299; Com. *v.* Morgan, 149 Mass. 314; Com. *v.* Noble, 165 Mass. 13.

spoken of this. "We do not think it needs argument to show that the Legislature may dispense with a purely formal averment which would give the defendant no additional information, and the omission of which would not prejudice him."[1]

The office of the indictment being principally to convey information of the charge to the defendant, so that he may be prepared at the trial, it would seem that no constitutional right is impaired if the description of the offence is made as accurate as the proof required. Cases have arisen where conviction was practically impossible if the rule of the common law were to be observed. So it was necessary to provide for such cases by statute. The courts have been asked to declare such statutes unconstitutional. It is instructive to read what they have said.

By St. 1864, c. 250, § 1, (Pub. Sts. c. 214, § 26,) it was provided: "No variance between any matter, in writing or in print, produced in evidence on the trial of any criminal cause, and the recital or setting forth thereof in the complaint, indictment, or other criminal process whereon trial is had, shall be deemed material: *provided*, that the identity of the instrument is evident, and the purport thereof is sufficiently described to prevent all prejudice to the defendant." An indictment was found charging the defendant with having in his possession with unlawful intent counterfeit bank bills. A copy of the bill was given in which a name on the bill was stated to be P. E. Spinner. At the trial it appeared that the name on the bill was F. E. Spinner. The defendant contended that there was a fatal variance, and that the statute, so far as it affected this question, was unconstitutional. The court refused to adopt this view of the statute. "We entertain no doubt of the constitutionality of this section [one], which promotes the ends of justice by taking away a purely technical objection; while it leaves the defendant fully and fairly informed of the nature of the charge against him, and affords him ample opportunity for interposing every meritorious defence. Technical and formal objections of this nature are not constitutional rights."[2]

For many years the following statute has been in force substantially as it is given in Public Statutes, c. 203, § 44:—

"In prosecutions for the offence of embezzling, fraudulently converting to one's own use, or fraudulently taking and secreting with intent so to

[1] Holmes, J., in Com. *v.* Freelove, 150 Mass. 66.

[2] Com. *v.* Hall, 97 Mass. 570; Foster, J., p. 573.

embezzle or convert the bullion, money, notes, bank notes, checks, drafts, bills of exchange, obligations, or other securities for money, of any person, bank, incorporated company, partnership, city, town, or county, by a cashier, or other officer, clerk, agent, or servant of such person, bank, incorporated company, partnership, city, town, or county, it shall be sufficient to allege generally in the indictment an embezzlement, fraudulent conversion, or taking with such intent, of money to a certain amount, without specifying any particulars of such embezzlement; and on the trial evidence may be given of any such embezzlement, fraudulent conversion, or taking with such intent, committed within six months next after the time stated in the indictment; and it shall be sufficient to maintain the charge in the indictment, and shall not be deemed a variance, if it is proved that any bullion, money, notes, bank note, check, draft, bill of exchange, or other security for money of such person, bank, incorporated company, partnership, city, town, or county, of whatever amount, was fraudulently embezzled, converted, or taken with such intent, by such cashier, or other officer, clerk, agent, or servant, within said period of six months."

It was contended in Com. *v.* Bennett,[1] that this statute was unconstitutional. The allegation in the indictment was "certain money to the amount and value of twenty-five thousand dollars . . . did embezzle and fraudulently convert to his own use." This was held sufficient under the statute. With reference to the claim of unconstitutionality, the court said, "Nor is it open to the objection that the offence is not set forth 'fully and plainly, substantially and formally,' as required by the Declaration of Rights, Art. XII. The defendant, if he had desired, could have applied for a specification of the particular acts relied on by the government, as may be done in other cases where the offence is of a general nature, and the charge is in general terms. Such an application might have been made at the trial, and granted by the court if in its discretion the circumstances of the case required it."

The power of the court to order specifications is undoubted, and has been exercised from early times; so no surprise is waiting the defendant at the trial in cases where the allegation is general.[2] From these cases it is reasonably plain that the courts will sanction, and even welcome, statutes which will assist in simplifying criminal pleading and procedure; and that, if the statute provides that the real and substantial elements which go to make up the offence are

[1] 118 Mass. 443.

[2] See Com. *v.* Snelling, 15 Pick. 321, where the defendant, who had been indicted for publishing a libel, was required to furnish specifications in support of justification.

to be set out, the courts will not declare it void as infringing the constitutional provision.

There is much to be done. With proper legislation the present formal requirements can be done away with and the substantial matters only retained. Prominent among the offences needing radical treatment are embezzlement and false pretences. With such legislation, forgery, perjury, and many offences will not present the difficulties which now exist. No substantial rights will be taken from the accused, and the public will derive a great benefit.

Much delay would be saved if trivial and purely formal mistakes in the indictment could be amended. It is generally assumed that there is no power to allow this to be done. It is not so clear, however, that the Legislature may not empower the court to cause such amendments to be made. In Com. *v.* Holley,[1] a statute authorizing amendment was upheld. The indictment in that case was found under St. 1852, c. 322, § 12, and charged the defendant with being a common seller of intoxicating liquor, and set forth a prior conviction. The statute provided a higher penalty for a second offence of this nature; therefore the recital of the former conviction was essential. There was an error in this recital. The prosecuting officer was allowed to amend. The statute authorized this. The constitutionality of this provision of the statute was attacked; but the court upheld it. Shaw, C. J., in delivering the opinion, said (p. 459): —

"But the court are of opinion that the statute is not open to this objection. . . . The statute certainly intends to punish a party, on a second conviction, with greater severity than on the first, and therefore it is proper that the accused should understand from the indictment that he is charged with an offence aggravated by the fact of a prior conviction. . . . But such prior conviction is a collateral fact, which can only be proved by record, and therefore, in whatever form it is alluded to or mentioned in the indictment, it must be made certain by the record, when produced. There is no danger, therefore, that a party can be injured by such an amendment, because it must conform to the record; otherwise the record will not prove it, or sustain the averment of a former conviction. It is a part of the indictment which derives increased weight from the finding of the grand jury, and one upon which they pass no judgment, but merely report the prior conviction, to be verified and identified wholly by the production of the record. The great principle asserted by the Declaration of Rights is that no man shall be put to answer a criminal charge until

[1] 3 Gray, 458.

the criminal evidence has been laid before a grand jury, and they have found probable cause, at least, to believe the facts true on which the criminality depends. But, in setting forth a former conviction, they aver no fact resting on testimony, except that of identity of the person charged with the person before convicted. That fact being found, all the particulars respecting the former conviction, as to the nature of the crime, the time and circumstances of its commitment, the time when and the court before whom the conviction was had, and the sentence awarded, must be proved by matter of record, altogether more certain than any finding of a grand jury, upon an *ex parte* hearing, possibly can be, and such prior conviction, being a judgment against the party himself, is necessarily one of which he is conversant, and by which he is conclusively held."

This case is certainly an authority in favor of the right of the Legislature to authorize the amendment of an indictment. The amendment allowed was not one of form merely. As we have seen before, the subject matter of the amendment was a necessary part of the indictment.[1] It was essential to allege and prove that a prior conviction had been had, and that the defendant was the person who had been convicted. The identity of the defendant was a substantial issue. If the government failed to prove this, the case was not within the statute. In trials under the Habitual Criminals Act this issue of identity sometimes is tried at great length. This act provides that whoever has been twice convicted of crime, sentenced and committed for terms of not less than three years each, shall upon conviction of a felony be punished by imprisonment in the state prison for twenty-five years.

This case of Com. *v.* Holley has not been questioned in this State. It has been cited with approval.[2] If an amendment may be permitted in such a case, it is reasonable to suppose that it may be allowed in a pure matter of form. Legislation authorizing amendments in formal matters would advance greatly the administration of the criminal law.

The work of reform should not be confined to procedure. Much ought to be done with reference to the substantive law of crimes. For example, the technical distinction between larceny, embezzlement, and false pretences — which are merely different forms of theft — should be abolished. But to examine this subject thoroughly would extend this article beyond reasonable bounds.

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[1] Com. *v.* Harrington, 130 Mass. 35.

[2] Com. *v.* Hall, 97 Mass. 570; Com. *v.* Harrington, *ubi supra.*

The purpose of the writer has been to show that evils exist in our present system of criminal pleading, and to point out a remedy. That it will be a laborious task to frame statutes which will render the pleading plain and direct, and the forms simple and harmonious, is thoroughly appreciated. It is believed, however, that this can be done. Is it not worth while to make the attempt? Increased efficiency in the enforcement of our criminal laws is surely to be sought. A successful result would mean an immense public gain.

Franklin G. Fessenden.

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